



STATE OF WISCONSIN

Division of Hearings and Appeals

In the Matter of

Outagamie County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206512

Pursuant to petition filed October 7, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Outagamie County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Thursday, January 5, 2023 at 01:00 PM by teleconference initiated from Madison, Wisconsin. The hearing was first scheduled for November 17, 2022. At that time, Respondent appeared but explained that she was homeless, checking out of a motel, and asked that the hearing be rescheduled. Her request was granted.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Outagamie County Department of Human Services
320 S Walnut St
Appleton, WI 54911-5985
By: Alicia Grube

Respondent:

██████████
████████████████████
████████████████

Did Not Appear

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Winnebago County who has received FS benefits as a one-member FS household since 2016 with occasional gaps in benefits. Exs. 2(e) and 2(f).
2. The agency has mailed Respondent “Enrollment and Benefits” booklets five times since 2018, most recently in April 2022. That booklet includes a description of FS recipient rights and responsibilities and information regarding the penalty for committing “FoodShare fraud”. The booklet also includes specific examples of behavior that may be considered fraudulent including the following: “Shelly is low on money; she is currently getting FoodShare benefits but has already spent her benefits for the month. Shelly offers her sister, Judy, money in exchange for her FoodShare benefits. Judy agrees and takes Shelly grocery shopping with Judy’s QUEST card.” Ex. 2(g).
3. On May 29, 2022, Respondent purchased groceries at a Pick ‘n Save store located in Waupaca using both her own FS EBT card and the FS EBT card of a homeless individual, [REDACTED]. She paid \$55 with her EBT card and \$109.33 with [REDACTED] EBT card. Exs. 2(a), 2(b), 3(a) and Testimony of Agency Representative Grube.
4. Respondent used the FoodShare card of [REDACTED], a second homeless individual, to purchase groceries from multiple retailers. Those transactions include but are not necessarily limited to those detailed below.

Transaction Date	Benefits Used	Retailer	Location
7/20/22	\$12.87	Casey’s	Menasha
7/20/22	\$323.14	Woodmans	Appleton
7/20/22	\$187.65	Walmart	Appleton
7/20/22	\$49.78	Target	Appleton
7/21/22	\$3.75	KwikTrip	Appleton
7/21/22	\$204.13	Walmart	Appleton
7/22/22	\$251.67	Woodmans	Appleton
7/22/22	\$431.55	Walmart	Appleton

Exs. 2(c), 3, and 4.

5. On July 22, 2022, [REDACTED], another FS recipient, paid \$100 to [REDACTED] in exchange for food that [REDACTED] purchased using FS benefits that had been issued to [REDACTED]. Ex. 2(c), 3, and 4 and Testimony of A. Grube.
6. On October 10, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent misused and trafficked FoodShare benefits and by receiving money for purchases made with a FoodShare card that belonged to another FoodShare household. That hearing notice informed Respondent that a hearing would take place by telephone on November 17, 2022.
7. On November 17, 2022, the assigned administrative law judge called Respondent who requested that the hearing be rescheduled. Her request was granted.
8. On November 21, 2022, the Division of Hearings and Appeals sent Respondent a hearing notice informing her that a hearing would take place by telephone on January 5, 2023 at 1:00PM.
9. The respondent failed to appear for the scheduled January 5, 2023 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that Respondent used the FS cards of two other individuals whose initials are [REDACTED] and [REDACTED] to purchase food that was not for their benefit and that she sold some of the food she purchased with [REDACTED] FS card to another individual for cash. The agency presented transaction history logs for FS cards issued to Respondent, [REDACTED], and [REDACTED] that show when and where each of those cards were used and the dollar amount of all transactions; several still shots from surveillance videos taken by various retailers where Respondent made purchases from July 20, 2022 through July 22, 2022 and corresponding receipts. That documentation was sufficient to show that Respondent used [REDACTED] FS card once in May 2022 and [REDACTED] FS card several times from July 20 – 22, 2022.

In addition to the documentary evidence that the agency produced, Agency Representative Grube offered credible testimony regarding telephone interviews she conducted with Respondent on July 7, 2022 and on August 15, 2022 and regarding an interview she conducted with [REDACTED]. (See Finding of Fact No. 5.) Agency Representative Grube stated that, on July 7, 2022, Respondent admitted to using [REDACTED] card and that she instructed Respondent at that time that doing so was a violation of FS program rules. Despite that warning and despite knowing that the agency was conducting an investigation involving her use of [REDACTED] FS benefits in May 2022, Respondent proceeded to use [REDACTED] FS card several times between July 20 and 22, 2022. (See Finding of Fact No. 4). Agency Representative Grube called Respondent on August 15, 2022 and Respondent acknowledged her use of [REDACTED] card (though she claimed [REDACTED] had asked her to do so on behalf of other needy people).

Based on the dollar value and timing of purchases as well as its review of surveillance video, the agency suspected that Respondent was not only using other FS recipients’ benefits to purchase food that was not intended for those recipients but that she was also trafficking benefits (i.e., buying and/or selling FS benefits). And, the agency presented sufficient evidence to show that Respondent did, in fact, receive payment from at least one individual, [REDACTED], for food that she purchased with [REDACTED] card on July 22, 2022.

Respondent’s actions constituted violations of both Wis. Stat. § 946.92(1)(dm)4. which prohibits reselling food purchased with FS program benefits for the purpose of obtaining cash or other consideration and 7 C.F.R. §274.7(a) which requires FS program benefits to be used only to purchase eligible food for the household to which the benefits were issued. Moreover, Respondent received repeated written notification of FS program rules from 2018 – April 2022 as well as specific instruction regarding the prohibition on using other people’s FS cards from Agency Representative Grube on July 7, 2022. I thus conclude that she knew the rules and that when she violated them, she did so intentionally. Respondent did not appear at the hearing to attempt to rebut or explain the agency’s persuasive evidence.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program state law prohibiting the selling of food purchased with FS benefits in exchange for cash and the FS program federal regulation mandating that benefits be used to purchase food for the benefit of the household to which FS is issued. See Wis. Stat. §§ 946.92(1)(dm)4., (2)(g) and 7 C.F.R. §274.7(a).
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

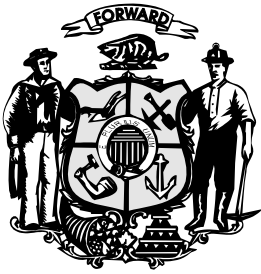
Given under my hand at the City of Madison,
Wisconsin, this 3rd day of February, 2023



\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

c: East Central IM Partnership - email
Public Assistance Collection Unit - email

Division of Medicaid Services - email
Alicia Grube - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 3, 2023.

Outagamie County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]